DEC 3 FILED 2

(3)

Supreme Court, U.S.
FILED
NOV 21 1995
OFFICE OF THE CLERK

No. 95-591

In the Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA, PETITIONER

v.

INTERNATIONAL BUSINESS MACHINES CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

DREW S. DAYS, III
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

BEST AVAILABLE COPY

10 pp

TABLE OF AUTHORITIES

Cases:	Page
Brown v. *Maryland*, 25 U.S. (12 Wheat.) 419 (1927)	4, 5
Cornell v. *Coyne*, 192 U.S. 418 (1904)	7
Department of Revenue of Washington v. *Association of Washington Stevedoring Cos.*, 435 U.S. 734 (1978)	5
Low v. *Austin*, 80 U.S. (13 Wall.) 29 (1872)	4
Michelin Tire Corp. v. *Wages*, 423 U.S. 276 (1976)	4
Rodrigues de Quijas v. *Shearson/American Express, Inc.*, 490 U.S. 477 (1989)	3
Thames & Mersey Marine Ins. Co. v. *United States*, 237 U.S. 19 (1915)	3
United States v. *Gainey*, 380 U.S. 63 (1965)	2
United States v. *Goodyear Tire & Rubber Co.*, 493 U.S. 132 (1989)	2-3
United States Shoe Corp. v. *United States*, No. 95-173 (Ct. Int'l Trade Oct. 25, 1995)	2
Constitution and statutes:	
U.S. Const. Art. I:	
§ 9, Cl. 5 (Export Clause)	2, 3, 5, 6, 7, 8
§ 10, Cl. 2 (Import-Export Clause)	3, 4, 5
26 U.S.C. 4371(1)	6
26 U.S.C. 4371(2)	6
26 U.S.C. 4372(d)(1)	7
26 U.S.C. 4372(d)(2)	7
26 U.S.C. 4461(a)	2
Miscellaneous:	
Madison's Notes of Debates in the Federal Convention	6
Warren, *The Making of the Constitution* (1928)	6

In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-591

UNITED STATES OF AMERICA, PETITIONER

v.

INTERNATIONAL BUSINESS MACHINES CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

---

1. Respondent errs in contending that the question presented lacks substantial continuing importance. The Federal Circuit held a federal tax to be unconstitutional in this case. That decision, if valid, would require the return of millions of dollars of federal revenues that have been collected from a large number of affected taxpayers. It would also directly undermine the congressional policy of placing foreign and domestic insurers on a more equal competitive footing. See Pet. 14-15. Review by this Court of the Federal Circuit's exercise of the Judiciary's most "grave power of annulling an Act of Congress" is

fully warranted. *United States* v. *Gainey*, 380 U.S. 63, 65 (1965).

Respondent mistakenly contends that the decision below implicates "no broad principle applicable to other revenue measures" (Br. in Opp. 6). Only four weeks ago, citing and relying on the decision entered in this case, the United States Court of International Trade held the federal "tax on any port use" (26 U.S.C. 4461(a)) to be unconstitutional as applied to transactions involving goods for export. *United States Shoe Corp.* v. *United States*, Slip op. 95-173, at 23 (Oct. 25, 1995). That decision, which involves more than $500,000,000 in revenues that have already been collected from the plaintiffs (*id.* at 8), is appealable only to the Federal Circuit.[1] See Pet. 13-14.

Since all taxpayers are entitled to pay a challenged tax and sue for a refund within the Federal Circuit, it is unlikely that other courts of appeals will have an opportunity to review the constitutional question presented in this case. This Court has long noted that plenary review is appropriate for decisions of the Federal Circuit that present issues of such substantial and recurring importance. See, *e.g.*, *United States* v. *Goodyear Tire & Rubber Co.*, 493 U.S. 132, 138 (1989); Pet. 14.

[1] As respondent notes (Br. in Opp. 14-15), the *United States Shoe Corp.* case presents the additional question whether the "tax on port use" is a fee for services, rather than a "tax." That question is relevant, however, only if a generally applicable federal tax that applies without discrimination to both domestic and international transactions would violate the Export Clause. In determining that such a generally applicable tax would violate the Export Clause, the Court of International Trade cited as authoritative, and applied the reasoning of, the decision of the Federal Circuit in this case. *United States Shoe Corp.* v. *United States*, slip op. 95-173, at 17-24.

Moreover, as the court of appeals emphasized (Pet. App. 11a), only this Court has "the prerogative of overruling its own decisions." *Rodrigues de Quijas* v. *Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989). Only this Court can determine whether the considerations that led it to uphold generally applicable, nondiscriminatory state taxes under the Import-Export Clause—and to overrule numerous inconsistent decisions in the process—apply equally to challenges to federal taxes under the Export Clause. In the absence of further review in this case, the Federal Circuit will be compelled to follow *Thames & Mersey Marine Ins. Co.* v. *United States*, 237 U.S. 19 (1915), even though, as the petition explains in detail (Pet. 15-30), the reasoning of that early decision has been repudiated by subsequent decisions of this Court.

2. a. Respondent contends that textual distinctions between the language of the Import-Export Clause and the Export Clause require that significantly different analyses be applied to constitutional challenges under those Clauses (Br. in Opp. 7-12). In particular, respondent suggests that an "impost or duty" under the Import-Export Clause is something different from—and narrower than—a "tax or duty" under the Export Clause (*id.* at 8-9).

In making that contention, respondent ignores the balance of the text of these Clauses. The Import-Export Clause precludes States from imposing "Imposts or Duties on Imports or Exports"; the Export Clause specifies that no federal "Tax or Duty shall be laid on Articles Exported." U.S. Const. Art. I, § 10, Cl. 2; Art. I, § 9, Cl. 5. A "tax" that is "laid on" an

"article exported" *is* an "impost" on an "export." An "impost" on an "export" *is* a "tax" that is "laid on" an "article exported." These constitutional phrases have an identical meaning, as this Court has consistently held. Giving effect to the *entire* text of both Clauses, the Court stated as long ago as *Brown* v. *Maryland*, 25 U.S. (12 Wheat.) 419, 445 (1827), that "[t]here is some diversity in language, but none is perceived in the act which is prohibited."

b. Respondent also errs in contending that the slight difference in phrasing of these two Clauses was "central to the *Michelin* and *Washington Stevedoring* holdings" (Br. in Opp. 9). In *Michelin Tire Corp.* v. *Wages*, 423 U.S. 276 (1976), the Court first explained the origin of the "original package" doctrine in *Low* v. *Austin*, 80 U.S. (13 Wall.) 29 (1872), and that *Low*'s reliance on *Brown* v. *Maryland* for that doctrine was misplaced. 423 U.S. at 281-283. See Pet. 16-18, 22-24. The Court then concluded, based upon a historical analysis of the origins and purposes of the Import-Export Clause, that "a nondiscriminatory ad valorem property tax is not the type of state exaction which the Framers of the Constitution or the Court in *Brown* had in mind as being an 'impost' or 'duty.'" 423 U.S. at 283. The Court explained that the history of the Import-Export Clause revealed that it was not designed to bring into question the constitutionality of a generally applicable state tax that applies to imported and domestic goods without discrimination. *Id.* at 286-290. See Pet. 23-24. The Court concluded that, consistent with its limited purpose, the Clause must be understood to permit general exactions that do not apply exclusively, or discriminatorily, to import or export transactions (423 U.S. at 293-294):

> [S]ince prohibition of nondiscriminatory ad valorem property taxation would not further the objectives of the Import-Export Clause, only the clearest constitutional mandate should lead us to condemn such taxation. The terminology employed in the Clause— "Imposts or Duties"—is sufficiently ambiguous that we decline to presume it was intended to embrace taxation that does not create the evils the Clause was specifically intended to eliminate.

In *Department of Revenue of Washington* v. *Association of Washington Stevedoring Cos.*, 435 U.S. 734 (1978), the Court again relied on the purposes of the Import-Export Clause—and not on the long-rejected contention that its text varies in substance from the Export Clause—in concluding that a nondiscriminatory, generally applicable state tax is not unconstitutional as applied to transactions involving imports or exports. The Court noted that the challenged tax "violates none of the constitutional policies identified in *Michelin*" and concluded that "[i]t is, *therefore*, not among the 'Imposts or Duties' within the prohibition of the Import-Export Clause." *Id.* at 761 (emphasis added). That holding makes clear that the decisions in *Michelin* and *Washington Stevedoring* were based upon the "constitutional policies identified in *Michelin*" (*ibid.*) and were not premised upon the inconsequential "diversity in language" of the two Clauses (*Brown* v. *Maryland*, 25 U.S. (12 Wheat.) at 445).

3. The reasoning of the Court in *Michelin* and *Washington Stevedoring* applies equally to nondiscriminatory federal taxes under the Export Clause. Those decisions demonstrate that, when a generally

applicable, nondiscriminatory tax is at issue, the mere fact that the tax applies also to goods that are in the export or import process does not provide a constitutitional immunity from taxation. See Pet. 27-30.

As the court of appeals acknowledged in this case (Pet. App. 4a), and as *Madison's Notes of Debates* and Warren's *Making of the Constitution* demonstrate, the Export Clause resulted from one of the sectional divisions that marked the Constitutional Convention (Pet. 28-29). In particular, it stemmed from the "concern that a Congress controlled by the more numerous and populous Northern States would impose burdensome levies on Southern exports" (Pet. App. 4a), including the "three great crops which grew nowhere else—tobacco, rice, and indigo" (Pet. 28 n.10). This narrow historical purpose of the Export Clause is complemented by the narrow language employed in the Clause, which proscribes only federal taxes "laid on" an "article exported."

There is obviously no basis for respondent to contend that the generally applicable tax on insurance imposed by Section 4371 of the Internal Revenue Code conflicts with the policies that the Export Clause embodies. This federal tax applies to many forms of insurance that have no relation whatever to exports or the export process (such as life insurance, sickness and accident policies, indemnity bonds and annuity contracts). See 26 U.S.C. 4371(1), (2). Even as applied to casualty insurance, the tax obviously has only an incidental and remote relationship to exports and the export process—and it applies equally to

wholly domestic commerce as well.[2] That the statute does not discriminate against exports is clear from its text, for it applies to insurance for any risk that arises either "wholly or partly within the United States" (26 U.S.C. 4372(d)(1), (2)).

In view of the limited purpose and narrow language of the Export Clause, there is no adequate rationale for sifting through all possible applications of a generally applicable, nondiscriminatory federal tax to proscribe its application in remote contexts involving exported goods. Consider, for example, a hypothetical transaction that is not unrelated to the facts of this case. A ship sets out from California with a cargo produced in Arizona. Part of the cargo will be offloaded in British Columbia to a buyer doing business there. The remainder of the cargo will be delivered to a buyer in Alaska. The cargo has been insured by a foreign insurer against damage or loss for its entire journey—beginning with its loading on trucks in Arizona and until delivery at the places of business of the buyers in British Columbia and Alaska. The nondiscrimination policies embodied in the Export Clause plainly do not require that the insurance covering the part of the cargo delivered in British Columbia be made exempt from the federal tax on insurance while the Alaska portion of the cargo is not. That would turn the constitutional shield against discrimination in the Export Clause into a sword requiring discrimination. As this Court noted in *Cornell* v. *Coyne*, 192 U.S. 418, 427 (1904), the

---

[2] Even within the specific category of casualty insurance, the statute applies to risks that have little or no connection with exports and exportation—such as fire, flood and earthquake.

Export Clause "does not mean that articles exported are relieved from the prior ordinary burdens of taxation which rest upon all property similarly situated." See Pet. 19-20.

A federal tax on insurance for risks that occur "wholly or partly within the United States"—and that applies without discrimination to both domestic and international commerce—is not a tax "laid on" an "article exported" within the meaning of the Export Clause. The contrary conclusion of the Federal Circuit in this case, and that court's annulment of an Act of Congress, warrants review by this Court.

For the reasons stated above and in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

NOVEMBER 1995